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JOSEPH F. SPANIOL, JR.
CLERKIN THE
Supreme Court of the United States

OCTOBER TERM, 1986

OTIS R. BOWEN, Secretary of Health and Human Services,

Petitioner,

vs.

JANET J. YUCKERT,

*Respondent.*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

**AMICI CURIAE BRIEF IN SUPPORT OF RESPONDENT
OF ALABAMA, ALASKA, ARKANSAS, COLORADO,
FLORIDA, HAWAII, ILLINOIS, INDIANA, IOWA, KANSAS,
KENTUCKY, LOUISIANA, MARYLAND, MICHIGAN,
MISSISSIPPI, NEBRASKA, NEW JERSEY, NEW MEXICO,
NEW YORK, NORTH CAROLINA, NORTH DAKOTA,
OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH DAKOTA,
TEXAS, VERMONT, WISCONSIN, WYOMING**

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No. 85-1409

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**BRIEF OF THE AMICI CURIAE STATES
IN SUPPORT OF RESPONDENT**

INTEREST OF THE AMICI CURIAE STATES

The interest of the *amici* States* arises in part from their statutory and contractual duties to determine in the first instance whether claimants are disabled for purposes of evaluating their initial and continuing eligibility for Social Security Disability ["SSD"] and Supplemental Security Income ["SSI"] benefits. 42 U.S.C §§ 421(a)(1) (SSD); 1383b(a) (SSI); 20 C.F.R. §§ 404.1601, *et seq.*; 416.1001, *et seq.* Pursuant to federal law, the State Disability

* The *amici* States file this *Amici Curiae* Brief pursuant to Supreme Court Rule 36.4 which provides for filing such a brief without consent of the parties.

Determination Services ["DDSs"] must apply all applicable federal statutes and regulations as well as all unpublished internal Social Security Administration ["SSA"] rules, program circulars, manuals, informational digests, etc. [hereafter "standards"] in making those determinations. 42 U.S.C. §§ 421(a)(1), 421(b). Failure to comply with SSA's standards can result in the imposition of severe financial sanctions against the DDSs or the assumption of administrative control of the programs by SSA. 42 U.S.C. §§ 421(b)(1); 421(c)(1); 421(c)(3)(C). As a result of legislation enacted in 1984, these harsh penalties can now be imposed as early as 180 days after a finding by SSA of State non-compliance.¹ The harshness of these penalties highlights the importance of SSA's promulgating standards that are clear, complete, and in compliance with the Social Security Act.

SSA's argument is based on its contention that in applying the threshold severity regulations involved herein, it has consistently utilized a *de minimis* standard and thus has screened out only those claimants whose impairments were so slight that they could never be found disabled. Petitioner's Brief at 13, 16, 29, 35. A major purpose of this brief is to demonstrate that this contention is false. Since mid-1976, through increased case returns in the Quality Assurance program, various unpublished internal rules and, later, federal regulations, SSA applied and required the State DDSs to apply a much stricter standard even though the statute remained unchanged. Because of the central role they play in the administration of the federal disability programs, the *amici* States which, together, are responsible for processing approximately 62% of the total applications for SSD and SSI benefits nationally,² were in the best position to learn of SSA's adoption of this improper severity standard. Thus, they are uniquely qualified to explain to this Court what that standard entailed and why it has exceeded a *de minimis* standard.³

¹ Social Security Disability Benefits Reform Act of 1984, P.L. No. 98-460, § 17(b)(1)(D)(i), codified as 42 U.S.C. § 421(b)(1).

² SSA Statistics, (June, 1986).

The *amici* States have a particularly strong interest in assuring that this Court recognizes the true nature of SSA's severity policy, as its imposition has placed the States in an untenable position: either they applied the severity standard that many believed, and which courts have found, to violate the Social Security Act or they refused to do so and risked SSA's imposition of harsh sanctions. Only if this Court affirms the appellate court's decision will the States again be permitted to make proper assessments of claimants' disability as intended by Congress.

The *amici* States also file this brief because of the tremendous human and financial costs that have been imposed by SSA's adoption and application of the improper severity standard. As is discussed more fully below, a primary congressional purpose in establishing the SSD and SSI programs was to relieve States and local governmental entities of the costs of providing public assistance to disabled persons. SSA's application of the improper severity standard has frustrated this purpose, as it has resulted and will continue to result in improper denials and terminations of benefits for tens of thousands of truly disabled persons. Because they are disabled, many of these persons have no other source of income. The denial or termination of SSD and SSI benefits has thus forced them to seek public assistance from State and local governmental entities in order to secure shelter, food, medical care and other basic necessities of life. The resulting increase in costs to the States and localities, directly contrary to congressional intent, will continue until this Court prohibits SSA from applying a threshold severity standard which has more than a *de minimis* impact.

SUMMARY OF THE ARGUMENT

The central issue before this Court is whether the threshold severity test adopted and applied by SSA since mid-1976 is a *de minimis* one, the only threshold standard permitted by the Social Security Act. Prior to 1976, SSA complied with the Act by applying a "slightness" standard pursuant to which only those persons who had an impairment(s) so minimal as not to preclude

any type of work activity were denied or terminated from disability benefits on medical grounds alone without full consideration of their age, education and work experience ["vocational factors"]. However, it has been the States' experience that, since mid-1976, SSA has imposed a threshold severity test that has exceeded a *de minimis* standard, thereby precluding proper disability adjudications and preventing claimants who are unable to return to their former employment due to an impairment from proving that they are too disabled to engage in other work.

SSA first imposed the new severity standard through its Quality Assurance program and unpublished internal policy statements wherein SSA broadened the definition of "slight" impairment to include increasingly disabling conditions, without reference to their impact on the individual claimant. Subsequently, although the Social Security Act was not amended in any relevant respect, SSA published regulations requiring applications for disability benefits to be denied on medical grounds alone as "not severe" unless the claimant's impairment(s) "... significantly limit the individual's physical or mental capacity to perform basic work-related functions." 20 C.F.R. §§ 416.920(c), 416.921, 404.1520(c), 404.1521 as published in 43 Fed. Reg. 55349 (Nov. 28, 1978).

Together, these substantial policy changes resulted in the imposition of far more than a *de minimis* threshold standard, a fact recognized by various State DDS and SSA officials. The impact of these changes was dramatic: the percentage of disability claimants denied on the ground that their impairments were "non-severe" increased more than five-fold from 8.4% of all SSD applications in 1975 to 43.2% in 1981.³

Despite its representations to the contrary, SSA has applied this severity standard at all levels of the adjudicatory process, with the result that hundreds of thousands of claimants were not accorded a full disability evaluation with consideration of the

³ Background Material and Data on Programs Within the Jurisdiction of the Committee on Ways and Means, 1986 Ed., House Comm. on Ways and Means, 99th Cong., 2d Sess. 114 (Mar. 3, 1986) [hereafter 1986 Background Materials].

claimant's vocational factors as intended by Congress. Even if these persons were too disabled to return to their prior employment, SSA's new severity standard prevented them from showing that they also could not perform other work in the economy. As a result of this threshold severity standard, many claimants were improperly found to be ineligible for SSD or SSI disability benefits on the ground that their impairments were "non-severe."

Because SSA's severity standard exceeded a *de minimis* test, numerous federal appellate courts have either invalidated SSA's threshold regulations or re-interpreted them to embody a *de minimis* standard. SSA has recently attempted to return to its prior slightness standard by issuing unpublished internal rulings. But the new rulings are ambiguous, particularly when read in conjunction with the unchanged published severity regulations. In light of SSA's prolonged application of the improper standard and the severity policy's continuing adverse impact on claimants, especially those 55 years of age and older, the ambiguities in the new rulings reveal the need for the Court to affirm the ruling below, in effect requiring SSA to modify the regulations. Only if this occurs will there be an end to SSA's use of confused, sometimes illegal, and frequently contradictory internal interpretations.

ARGUMENT

I. THE SOCIAL SECURITY ACT PROHIBITS THE SOCIAL SECURITY ADMINISTRATION FROM IMPOSING MORE THAN A *DE MINIMIS* THRESHOLD STANDARD UPON CLAIMANTS FOR SOCIAL SECURITY DISABILITY OR SSI DISABILITY BENEFITS.

A. The Social Security Act

Since establishment of the SSD and SSI programs in 1954 and 1974, respectively, the Social Security Act has defined disability for both programs in terms of the claimant's vocational factors,

medical impairments, the impairments' duration, and the functional restrictions imposed by them.⁴ Further, Congress intended that no one factor be considered to the exclusion of the others, as evidenced by the legislative history that medical and vocational factors be considered in all disability adjudications.⁵ Accordingly, SSA and DDSs are required to evaluate each claim in terms of the individual's ability to engage in past or other work. Further, as every federal appellate court has ruled, once a claimant shows that he or she is unable to return to prior employment because of a medical impairment, the burden shifts to the Secretary to identify other work in the national economy which the individual can perform.⁶

This Court has ruled that SSA regulations directing specified disability adjudications are valid only to the extent that they take administrative notice of certain facts which would otherwise have to be proven by repetitious testimony. *Campbell v. Heckler*, 461 U.S. 458, 467 (1983) (upholding SSA's medical-vocational guidelines). Following this reasoning, every federal appellate court considering the issue has ruled that, as SSA admits in its Petition at 23-24, the Act permits SSA to impose a *de minimis* threshold standard only if that test screens out only those cases in which the claimant's impairments are so minimal that no set of vocational factors, even if fully considered, could ever result in a

⁴ 42 U.S.C. §§ 423(d); 1383c(a)(3).

⁵ See e.g., S. Rep. No. 1987, 83rd Cong., 2d Sess. (1954), reprinted in 1954 U.S. Code Cong. & Admin. News 3710, 3730; S. Rep. No. 744, 90th Cong., 1st Sess. 43 (1967), reprinted in 1967 U.S. Code Cong. & Admin. News 2834, 2880, 2883, cited in *Baeder v. Heckler*, 768 F.2d 547, 551 (3d Cir. 1985).

⁶ *Francis v. Heckler*, 749 F.2d 1562, 1564 (11th Cir. 1985); *Channel v. Heckler*, 747 F.2d 577, 579 (10th Cir. 1984); *Hall v. Secretary of Health, Educ. and Welfare*, 602 F.2d 1372, 1375 (9th Cir. 1979); *Smith v. Califano*, 592 F.2d 1235, 1236-37 (4th Cir. 1979); *O'Banner v. Secretary of Health, Educ. and Welfare*, 587 F.2d 321, 323 (6th Cir. 1978); *Bastien v. Califano*, 572 F.2d 908, 912 (2d Cir. 1978); *Lewis v. Weinberger*, 515 F.2d 584, 587 (5th Cir. 1975); *Stark v. Weinberger*, 497 F.2d 1092, 1097-98 (7th Cir. 1974); *Hernandez v. Weinberger*, 493 F.2d 1120, 1123 (1st Cir. 1974); *Garrett v. Richardson*, 471 F.2d 598, 603-04 (8th Cir. 1972); *Meneses v. Secretary of Health, Educ. and Welfare*, 442 F.2d 803, 807 (D.C. Cir. 1971); *Choratch v. Finch*, 438 F.2d 342, 343 (3d Cir. 1971).

finding of disability.⁷ Such a *de minimis* threshold standard would preclude the need for a full consideration of vocational factors while not denying benefits to those claimants who meet the Act's definition of disability.

B. Before 1976, SSA Complied with the Act by Applying a De Minimis Threshold Standard¹.

Prior to 1976, as a matter of policy and practice, SSA applied a *de minimis* standard in compliance with the Act. SSA's published regulations required that all claimants with a medically determinable impairment (whether or not "severe") receive a complete assessment including consideration of medical and vocational factors. 20 C.F.R. § 404.1502(a)(1968). The only relevant exception to this full evaluation requirement, i.e., the only cases in which denials or terminations could be made on medical considerations alone, were those in which the claimant had only a "slight" impairment. *Id.*⁸

SSA's slightness regulations constituted no more than a *de minimis* threshold standard because they defined "slight" to involve "...only a slight departure from a normal condition." 20 C.F.R. §§ 404.1502(a), 416.902(a). See also SSA Disability

⁷ *McDonald v. Secretary of Health and Human Services*, 795 F.2d 1118 (1st Cir. 1986); *Wilson v. Secretary of Health and Human Services*, 796 F.2d 36 (3d Cir. 1986); *Brown v. Heckler*, 786 F.2d 870 (8th Cir. 1986); *Dixon v. Heckler*, 785 F.2d 1102 (2d Cir. 1986), petition for cert. filed, 55 U.S.L.W. 3017 (U.S. July 2, 1986)(No. 86-2); *Hansen v. Heckler*, 783 F.2d 170 (10th Cir. 1986); *Yuckert v. Heckler*, 774 F.2d 1365 (9th Cir. 1985); *Salmi v. Secretary of Health and Human Services*, 774 F.2d 685 (6th Cir. 1985); *Johnson v. Heckler*, 769 F.2d 1202 (7th Cir. 1985), petition for cert. filed, 54 U.S.L.W. 3600 (U.S. Feb. 27, 1986)(No. 85-1442); *Stone v. Heckler*, 752 F.2d 1099 (5th Cir. 1985); *Evans v. Heckler*, 734 F.2d 1012 (4th Cir. 1984); *Brady v. Heckler*, 724 F.2d 914 (11th Cir. 1984).

⁸ The other exceptions, not relevant to this case, permitted denial or termination of benefits without full assessment where the claimant was engaged in substantial gainful activity and when the impairment was not expected to last more than twelve months. 20 C.F.R. §§ 404.1502(a), 416.902(a).

Insurance State Manual § 321.B (Exhibit A).⁹ Those regulations deemed the following examples of impairments to be slight: "slight neurosis, slight impairment of sight or hearing, or other slight abnormality or a combination of slight abnormalities." *Id.* The use of the term "slight," the emphasis of SSA's published regulations on minimal impairment and the nature of the examples cited, were all clear indications to the State DDSs that SSA's policy was that very few and only the most minor impairments were to be determined "slight."

SSA's day-to-day practice was consistent with its written policies. The vast majority of claimants were found to have impairments which exceeded the *de minimis* threshold standard. Indeed, in 1975, more than 90 % of all SSD claimants passed this threshold test¹⁰ and received a determination that was based at least in part on an evaluation of their ability to perform past or other work.¹¹ In its pre-1976 reviews of samples of State DDS decisions for compliance with SSA's policies, made pursuant to 42 U.S.C. §§ 421(b)(1) and 421(c)(2), (3), SSA rarely ruled that a

⁹ All exhibits referenced herein appear in the *amici* States' Appendix, copies of which have been lodged with the Court. Most of these documents also appear in the Joint Appendix in *Dixon v. Heckler*, 785 F.2d at 1102 (a copy of which has been lodged with the Court with the Respondents' Brief in Opposition to Certiorari in that case) and are referenced by "DJA" followed by page numbers.

The Court can take judicial notice of these documents pursuant to Federal Rules of Evidence Rule 201(b)(2), (f), as it has taken notice of other documents and information submitted by *amici curiae*. *Regents of University of California v. Bakke*, 438 U.S. 265, 316-17, 321-24 (1978); *San Antonio School District v. Rodriguez*, 411 U.S. 1, 56-7, n. 111 (1973). See also *Papasan v. Allain*, 106 S. Ct. 2932, 2935, n.1 (1986) (The Court can consider undisputed items in the "public record"); 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4036 (1978).

¹⁰ 1986 Background Materials at 114.

¹¹ In those years, only 47 % of the claimants who passed this threshold test were found eligible at the later steps. *Staff Data and Materials Related to the Social Security Disability Insurance Program*, Senate Finance Comm., 97th Cong., 2d Sess. 21 (Aug., 1982).

claim which had been allowed should have been denied on grounds that the impairment was "slight." This is additional proof that SSA's policy permitted only those impairments which had the most minimal impact on a claimant's functional ability to be deemed "slight" and constitute a basis for denying or terminating benefits on medical grounds alone.

II. BEGINNING IN 1976, SSA BEGAN IMPOSING A THRESHOLD TEST FOR DISABILITY BENEFITS THAT EXCEEDED A *DE MINIMIS* STANDARD, THEREBY UNLAWFULLY DEPRIVING CLAIMANTS OF A FAIR OPPORTUNITY TO PROVE THEIR ELIGIBILITY FOR BENEFITS.

A. SSA Imposed Its New Severity Standard Through Its Quality Assurance Program and Unpublished Internal Rules and Later Through its Regulations.

1. SSA Broadened the Definition of "Slight" Impairment to Include Increasingly Disabling Conditions Without Reference to their Impact on Individual Claimants.

Although the relevant sections of both the Act and, until 1979, SSA's published regulations, remained unchanged, the federal agency began in 1976 to implement substantial policy changes which would cause the denial and termination of benefits to hundreds of thousands of persons without a proper assessment of disability. First, SSA began requiring that impairments imposing greater than slight limitations now be deemed "slight." This change was initially implemented not through publication of federal regulations with public notice or opportunity for comment, or even by internal written instructions, but rather through SSA's Quality Assurance process. Whereas SSA had been approving virtually all State DDS determinations regarding the severity of claimants' impairments, in mid-1976 SSA began returning a number of cases in which benefits had been allowed after

consideration of medical and vocational factors.¹² SSA's instructions accompanying the returned cases directed that the claimants' impairments be found to be "slight" and that benefits be denied or terminated without consideration of vocational factors.¹³

These returns involved impairments of a far different character than the three types of disabilities listed as "slight" in the published federal regulations. See Section I.B., *supra*. For example, SSA

¹² DDSs must necessarily place great significance on Quality Assistance case returns as they can reveal new SSA policies which the State agencies must apply to avoid imposition of sanctions. See *City of New York v. Heckler*, 578 F. Supp. 1109, 1115-16 (E.D.N.Y.), *aff'd*, 742 F.2d 729 (2d Cir. 1984), *aff'd*, 106 S.Ct. 2022 (1986); *Minnesota Mental Health Assoc. v. Schweiker*, 554 F. Supp. 157, 163 (D. Minn. 1982), *aff'd*, 720 F.2d 965 (8th Cir. 1983); *Social Security Disability Insurance: Hearing Before the Subcomm. on Social Security of the House Ways and Means Comm.*, 98th Cong., 1st Sess. (June 30, 1983) [hereafter *June 30, 1983 House Ways and Means Comm. Hearing*] at 126 (Statement of Peter J. McGough, Associate Director, Human Resources Division, United States General Accounting Office).

¹³ In December, 1976, the Director of the New York State DDS wrote to SSA that:

[O]ur staff as well as staff in other State agencies have been expressing concern over the ever increasing returns of cases with suggestions that a denial based on slight impairment is appropriate. We have had difficulty in relating these individual cases to current Regulations and the provisions in the State Manual.

Letter from Sidney Houben, Director, New York State DDS, to Elmer Smith, Associate Commissioner of the Office of Program Policy and Planning of SSA, dated December 27, 1976 at 1-2 [hereafter *Houben Letter dated December 27, 1976*] (Exhibit B, DJA 300-301). Mr. Houben also recognized that the increased case returns were a result of SSA's concurrent adoption of the new severity standard (See Section II.A.2, *infra*):

The proposed changes in the regulations make it clearer as to why these returns have been forthcoming and we believe this supports our feeling that this change is more than a technical clarification of language.

directed the New York DDS to find the loss of an eye, hypertension, and colostomy to be "slight" impairments. This policy change was eventually reduced to writing in December, 1978 when SSA issued a list of impairments which were to be considered "non-severe:"

- (1) loss of one eye or loss of vision in one eye; (2) essential hypertension with no evidence of retinal exudates, hemorrhage or papilledema; congestive heart failure, renal dysfunction; or neurological residuals of cerebrovascular accident; (3) colostomy, uncomplicated, with proper function of the stoma; (4) epilepsy, with no major motor seizures for 12 months or more; (5) I.Q. of 80 to 90 in all major areas of intellectual functioning.

SSA Disability Insurance State Manual § 321.B. (Exhibit A). This list was expanded, through issuance of Program Operations Manual System ["POMS"] DI § 2107.C in 1981 and SSA Ruling 82-55 in 1982,¹⁴ to include twenty examples of impairments which were to be found "non-severe." Examples of the listed conditions were: osteoarthritis, excision of lumbar disc, obstructive airway disease, and epilepsy. *Id.*

Clearly, the impairments included in these listings are of far greater severity than those described in the pre-1976 listing of "slight" impairments and in many instances impose more than minimal restrictions. For example, the "loss of one eye," which necessarily impairs depth perception and peripheral vision, is far more serious an impairment than "slight vision impairment."

¹⁴ SSA Rulings constitute policy with which SSA Administrative Law Judges and the SSA Appeals Council must comply, as well as the State DDSs. 20 C.F.R. § 422.408.

As with the initial list issued in 1978, this expanded list of "non-severe" impairments was never published in the Federal Register for public comment as required by 7 U.S.C. § 553, despite requests from SSA's own personnel. See Memorandum from Martha A. McSteen, Regional Commissioner for the Dallas Regional SSA Office, to SSA Associate Commissioner for Operational Policy and Procedures, dated December 10, 1980 at 1 [hereafter *1980 McSteen Memorandum*] (Exhibit C, DJA 699).

Similarly, a gastrointestinal impairment requiring surgery such as a colostomy, is much more serious than a mere "abnormality," particularly if the colostomy was due to a chronic illness such as ileitis. Even SSA personnel objected that some of the impairments should be deemed severe.¹⁵ Yet, by 1978, SSA's internal rules required the States to deny and terminate benefits to persons with these conditions on medical grounds alone. Necessarily, many more cases were denied and terminated without consideration of the claimant's vocational factors or functional limitations.

In addition to being medically incorrect, SSA's attempts to generalize about specific impairments without consideration of each claimant's actual functional limitations was, for several reasons, practically impossible to apply. SSA's listings failed to recognize that medical impairments can affect different persons differently. For example, a physician might well advise a person who had had a colostomy or disc surgery not to engage in medium lifting or repeated bending.¹⁶ Indeed, it is medically impossible to lump all claimants who are suffering from a particular impairment into one group, irrespective of age, physical build, and residual capacity to lift, stand, bend, carry weights, and state that none of them have a severe impairment. However, the federal standards required exactly that.

In addition, SSA's expanded lists of non-disabling impairments fail to recognize that even though two claimants may have the same impairment, differing vocational factors can mean that one will be able to work and the other will not. By pre-empting

¹⁵ In her comments on the proposed draft of the expanded listing, the SSA Regional Commissioner for the San Francisco Region protested that osteoarthritis with minimal findings and hypertension with a CVA (even without neurological residuals) should be considered severe impairments. Memorandum from Jane Presley, Regional Commissioner for the SSA Regional Office for San Francisco, to SSA Associate Commissioner for Operational Policy and Procedures, dated December 1, 1980 at 1 (Exhibit D, DJA 690).

¹⁶ See 1980 McSteen Memorandum at 1 (Exhibit C, DJA 699).

consideration of these factors, the severity standard precluded proper evaluations of claimants' ability to work in a substantial number of cases.¹⁷

2. Concurrently, SSA Adopted a Policy Requiring that Impairments be "Severe" in Order to Warrant a Full Evaluation of Disability.

Although the relevant provisions of the Social Security Act have not been amended, in June, 1976, SSA issued the following proposed regulatory change to the State DDSs:

... medical considerations alone can justify a finding that the individual is not under a disability where the impairment is not severe, that is where the impairment does not significantly limit the individual's physical or mental capacity to perform basic work related functions.¹⁸

¹⁷ See Section II.C., *infra*, for statistics showing the dramatic increase in the number of disability claims denied for lack of a severe impairment subsequent to the change in SSA's policy.

¹⁸ Memorandum from Robert P. Bynum, SSA Associate Commissioner of the Office of Program Operations, to SSA Regional Commissioner for the Dallas Region, dated June 8, 1976 at 2 [hereafter *June 8, 1976 Bynum Memorandum*] (Exhibit E, DJA 314). A copy of this Memorandum was distributed as SSA policy to all State DDSs (along with the document marked as Exhibit J) through inclusion in SSA's *Compendium of Policy and Procedural Guidance Memoranda Prepared by the Bureau of Disability Insurance*. The Compendium included copies of memoranda prepared by SSA to explain, clarify or amplify disability policy or procedural concepts. While the preface to the Compendium indicated that the memoranda were not official instructions, it did specify that the memoranda were to be used by operations personnel for background and reference. Another notice to all DDSs stated that the volume included copies of "selected policy statements." [Emphasis added.] The Compendium has since been superseded by other SSA guidelines which incorporate the policies therein.

The language of the proposed regulation was included in a letter from Sidney Houben, Director, New York State DDS, to Henry Riley, SSA Regional Representative for the New York Region, dated December 23, 1976 at 1 [hereafter *Houben Letter dated December 23, 1976*] (Exhibit F, DJA 298).

At the same time, the new policy also appeared in other internal SSA documents,¹⁹ announcements, and training materials²⁰ which the State DDSs were required to apply in order to avoid imposition of the severe financial and administrative sanctions discussed above. However, not until more than two years after it had implemented the new severity threshold requirement did SSA incorporate this policy in revised regulations,²¹ which were effective February 28, 1979. The new regulations provided:

Medical considerations alone can justify a finding that an individual is not under a disability where the medically determinable impairment is not severe. A medically determinable impairment is not severe if it does not significantly limit an individual's physical or mental capacity to perform basic work-related functions.

20 C.F.R. §§ 404.1520(c); 416.920(c).

In several respects, SSA's new severity policy constituted a substantial departure from the agency's prior policy. The major change is the substitution of the "non-severe" threshold standard for the prior "slight" standard, thereby imposing more than a *de minimis* standard. See Section II.B., *infra*. Second, the revised federal regulations require that a claimant's impairment be

¹⁹ Memorandum from Robert P. Bynum, SSA Associate Commissioner for Office of Program Operations, to SSA Regional Commissioner for the Chicago Region, dated December 27, 1976 at 1 (Exhibit G, DJA 649). A copy of this Memorandum was distributed to all Regional Commissioners by Memorandum from Mr. Bynum dated January 14, 1977 (Exhibit H, DJA 648).

²⁰ The new severity standard was discussed by SSA Central Office staff at a December 8, 1976 meeting in Baltimore attended by State DDS staff and included in background materials prepared for that meeting. See Houben Letter dated December 23, 1976 at 1 (Exhibit F, DJA 298).

²¹ 43 Fed. Reg. 55349 (Nov. 28, 1978). The regulation had been published in proposed form earlier in the year. 43 Fed. Reg. 9303 (Mar. 7, 1978).

judged, not on the medical grounds of whether it constitutes a minimal deviation from the individual's normal physical or mental condition, but rather by whether it "significantly" interferes with "most basic work activities" as performed by the average individual. Further, the regulations do not define the term, "most basic work activities," nor what exertion or sustained capacity to perform individual work activities such as lifting, standing, bending, and carrying weights is required to meet this test.

Most troubling, the severity test revealed that SSA's new policy and practice was to deny and terminate claims on medical grounds alone even though the claimant was so impaired that he or she could not return to prior employment. This policy was imposed on the States as early as June, 1976, see June 8, 1976 Bynum Memorandum at 1 (Exhibit E, DJA 313), and made binding on the ALJs and the Appeals Council in SSA Ruling 82-56.²² That Ruling, effective retroactively to August 20, 1980, states in relevant part:

A finding of ability to engage in SGA may be justified on the basis of medical considerations alone when the degree of a medically determinable impairment is found to be not severe. A not severe impairment may consist of one or more separate conditions that do not significantly limit the individual's physical or mental capacity to perform basic work-related functions.

Performance of basic work-related functions involves a capacity for sitting, standing, walking, lifting, pushing, pulling, handling, seeing, hearing, communicating, and understanding and following simple instructions. When there is no significant limitation in the ability to perform these types of basic work-related functions, *an impairment will not be considered to be severe even though it may prevent the individual from doing work that the individual has done in the past.*

²² SSA Ruling 82-56 was never published in the Federal Register with the required opportunity for public comment.

SSR 82-56 at 112 (Emphasis added). SSR 82-56 directly contradicted the Act's requirement of full disability evaluation for all claimants who suffer from more than a slight impairment. More specifically, SSA Ruling 82-56 prevented claimants from even showing that they could not return to their prior work, and so violated those court rulings specifying that the burden of proof shifts to the Secretary upon such a *prima facie* showing. See *Smith v. Heckler*, 595 F. Supp. 1173, 1179 (E.D. Ca. 1984). Persons unable to do their past work clearly have more than minimal impairments; yet SSA Ruling 82-56 prevented the State DDSs from conducting a full disability evaluation including consideration of vocational factors in these cases. SSA's policy had an adverse effect on all claimants but especially on those age 55 and older, for whom SSA's medical-vocational guidelines would otherwise direct a finding of disability on the basis of their age, education and work experience once they had shown they were unable to return to their prior employment.²³

B. The State Disability Agencies and Even SSA Itself Recognized that the New Threshold Standard Exceeded a De Minimis Test.

Various State DDS administrators, as well as SSA's own staff, strongly objected to SSA's use of an increased threshold standard which denied benefits to persons who were unable to perform their prior work and were otherwise unable to engage in substantial gainful employment. In one such protest, the Director of the New York State DDS asserted, prior to amendment of the regulations, that SSA's implementation of the new severity standard would:

... confuse our staff. We believe that it is a more restrictive definition and will result in claims being denied

²³ See *Dixon v. Heckler*, 589 F. Supp. 1491, 1508 (S.D.N.Y. 1984), *aff'd*, 785 F.2d 1102 (2d Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3017 (U.S. July 2, 1986) (No. 86-2). See also Memorandum from Leader, "Not Severe" Impairment Workgroup to SSA Acting Deputy to the Deputy Commissioner for Programs and Policy Re: Final Report and Recommendations of Workgroup - DECISION, dated August 23, 1983 [hereafter 'Not Severe' Impairment Workgroup Report] at 11 (Exhibit I, DJA 620).

because vocational factors were not considered along with medical evidence.²⁴

In another letter, he protested that the substitution of "non-severe" for "slight" was "an amendment to the current Regulation..." and went on to object that:

Although the panel at the public meeting as well as the background statement for the meeting characterized this change as a 'technical clarification of language', we believe that a change in definition is involved. This change will result in a substantially larger percentage of claims which are automatically denied based on medical considerations alone. Thus, claimants who currently are afforded an opportunity for consideration of non-medical factors will no longer receive such treatment.

Houben Letter dated December 27, 1976 at 1 (Exhibit B, DJA 300). Other State DDSs, including those in California and New Mexico, also questioned the increased severity threshold standard in communications with SSA and responses to congressional inquiries.²⁵

While SSA staff denied that a policy change had occurred, characterizing it as a mere "technical clarification,"²⁶ SSA's own staff quickly recognized the substantial policy change it represented. They protested that imposition of SSA's threshold

²⁴ Houben Letter dated December 23, 1976 at 1-2 (Exhibit F, DJA 298-99).

²⁵ See, e.g., Memorandum from Martha A. McSteen, Regional Commissioner for the Bureau of Disability Insurance for the Dallas Regional SSA Office, to Robert P. Bynum, SSA Associate Commissioner for the Office of Program Operations, dated March 29, 1976 at 1 [hereafter 1976 McSteen Memorandum] (Exhibit J, DJA 309). From 1982 until 1986, Mrs. McSteen was Acting Commissioner of SSA. See also *Actuarial Condition of Disability Insurance - 1978*, Subcomm. on Social Security of the House Ways and Means Comm., 96th Cong., 1st Sess. 14-17 (Feb. 1, 1979).

²⁶ 43 Fed. Reg. 9296 (Mar. 7, 1978). See also 43 Fed. Reg. 55358 (Nov. 28, 1978).

severity standard was inconsistent with the published policy and would have the effect of precluding full disability assessments in a substantial number of cases. The SSA Regional Commissioner for New York wrote a letter to the SSA Central Office stating:

The DDSs have been questioning us with increasing frequency about the issue of what constitutes a 'slight' impairment. Based on feedback from BDI quality reviews, we must share their concern. Existing DISM guidelines are being interpreted more broadly by C/O reviewing staff in various case-related situations, as well as in general publications such as the new DOM XV on Quality Assurance.²⁷

He went on to object to SSA's policy under which a claimant with epilepsy who is restricted from driving, working at heights or using sharp tools has only a "slight" impairment.²⁸

Noting "a growing concern over the high incidence of not severe denials at initial and reconsideration," the SSA Regional Commissioner for the Dallas Region objected to the vagueness of the new standard. 1980 McSteen Memorandum at 1 (Exhibit C, DJA 699). She also stated her concern that use of different policies (a "slightness" policy by States and a "severity" policy by the federal Quality Assurance reviewers), would lead to more case returns to State DDSs and the formulation of SSA policy through the QA process. *Id.*

When SSA published the proposed severity regulations in 1978, SSA's highest adjudicative branch, the SSA Appeals Council, objected that those regulations established a heightened standard that was inconsistent with SSA's public statement that it did not

²⁷ Memorandum from Joseph J. Kelly, SSA Regional Commissioner for New York, to SSA Associate Commissioner for the Office of Program Operations, dated January 4, 1976 at 1 (Exhibit K, DJA 303).

²⁸ *Id.* at 2.

intend to modify its prior slightness standard.²⁹ In 1981, the Council reiterated its position that the slightness standard it utilized was inconsistent with SSA's new severity standard and requested that the matter be dealt with before SSA issued a new listing of "non-severe" impairments.³⁰

Other SSA personnel specifically objected to the fact that the new threshold severity standard permitted denial and termination of benefits in cases where the claimant could not return to his or her former employment:

It is inconsistent almost to the point of being ridiculous to characterize any impairment which prevents an individual from doing his customary work, no matter the unique character of that work, as 'slight' in the context of that individual's particular cases, if in fact, it is 'the primary reason for the individual's unemployment.'³¹

Even the Secretary of HHS has since admitted that the application of the threshold severity standard constituted a policy change. On August 23, 1983, a SSA workgroup issued an internal report on the severity regulations. That report stated:

Whatever SSA's actual conception of the minimum impairment level was for policy purposes between 1975 and the present, its *application* of the concept in deciding cases suggests a change of position. Yet, at the same time, there was no corresponding change in the Statute and, in fact, SSA itself stated that the regulations did not constitute a change of standard.³²

²⁹ Memorandum from SSA Appeals Council to SSA Office of Policy and Procedure Re: Recodification of Regulations on Determining Disability and Blindness, dated August 8, 1979 at 2 (Exhibit L, DJA 667).

³⁰ Memorandum from Jacob M. Wolf, Acting Director, Office of Policy and Procedures in the SSA Office of Hearings and Appeals, to Office of Disability Programs in the SSA Office of Operational Policy and Procedures, dated January 2, 1981 at 3 (Exhibit M, DJA 728).

³¹ 1976 McSteen Memorandum at 2 (Exhibit J, DJA 310).

³² "Not Severe" Impairment Workgroup Report at 11 (Exhibit I, DJA 620).

These contemporaneous admissions by SSA officials that the severity standard exceeded a *de minimis* test reveal the fallacy of the agency's recent statements that it has never applied more than a "slightness" standard or that the improper severity standard did not have a massive adverse impact on disability claimants. See SSA Ruling 85-28; n. 50, *infra*.

C. SSA's Implementation of Its New Threshold Standard Led to a Substantial Increase in the Percentage of Claimants Denied Benefits Without a Full Evaluation of Whether They Could Do Substantial Gainful Work in Light of Their Vocational Factors.

That SSA's severity standard exceeded a *de minimis* standard was just as clearly shown by the dramatic increase in the number of SSD and SSI cases denied without consideration of vocational factors, on the basis that the claimant did not suffer a severe impairment. Prior to 1976, the percentage of claimants denied on the grounds of "slight" impairment was very low: only 8.4 % of SSD claims were denied as "slight."²³

As a result of SSA's imposition of the new severity standard, the percentage of cases denied on the basis of "slight" impairment skyrocketed. The following statistics reveal the magnitude of SSA's change in policy:

²³ 1986 Background Materials at 114. In addition, one SSA official noted that,

... a Dallas study of more than 2500 CRS reviewed cases strongly suggested, on the basis of internal inconsistencies between the basis code, diagnoses, and rationale, that fewer than 3 % of SSI claims are correctly denied on this basis.

1976 McSteen Memorandum at 1 (Exhibit J, DJA 309).

TITLE II DISALLOWANCES BASED ON NON-SEVERE IMPAIRMENT²⁴

Fiscal Year	% of Total Disallowances	Fiscal Year	% of Total Disallowances
1975	8.4	1981	43.2
1976	10.8	1982	38.9
1977	24.8	1983	39.4
1978	31.8	1984	34.3
1979	41.6	1985	23.3
1980	39.0		

III. SSA'S IMPROPER SEVERITY STANDARD HAS IMPOSED SEVERE AND IRREPARABLE HUMAN AND FINANCIAL COSTS ON DISABLED PERSONS AND THE STATES IN CONTRAVENTION OF CONGRESSIONAL INTENT.

A. Application of SSA's Severity Standard Has Resulted in Incorrect Denials and Terminations of Disability Benefits.

The results of SSA's court-ordered re-reviews of certain cases previously denied on the basis of a "non-severe" impairment reveals that the policy resulted in a substantial number of incorrect disability determinations. For example, in California, when SSA re-reviewed the cases of claimants who had been denied for this reason pursuant to the order in *Smith v. Heckler*, 595 F. Supp. at 1173, the reversal rate at the administrative hearing level was 45 % for the period March 8, 1985 through July 6, 1986. In New

²⁴ 1986 Background Materials at 114. The decrease in "non-severe" denials beginning in 1984 was a result of court orders enjoining application of the threshold severity standard in 12 States which, together, process approximately 29 % of the disability applications nationally. SSA Statistics (June, 1986). The twelve states were: Illinois (*Johnson*), Iowa (*Campbell v. Heckler*, 620 F. Supp. 469 (N.D. Iowa 1985)), New York (*Dixon*), and Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington (*Smith v. Heckler*, 595 F. Supp. at 1173).

York, new reviews pursuant to *Dixon v. Heckler*, 589 F. Supp. at 1512, of claimants previously denied benefits as having "non-severe" impairments, resulted in a reversal rate of 41% at the hearing level. In other States in which SSA's severity standard was enjoined, similar results appear. Thus, in Illinois, the approval rate has climbed from 34.3% to 52% at the initial level since entry of the injunction in *Johnson v. Heckler* and from 14.8% to 34.1% at the reconsideration level.³⁵

B. SSA's Severity Standard Has Resulted in the Imposition of Added Costs Upon the State and Local Governments in Contravention of Congressional Intent to Relieve their Public Assistance Costs for the Care of the Disabled.

As recognized by several courts,³⁶ and revealed in the legislative history, a principal congressional reason for enacting the SSD and SSI programs was to relieve State and local governments of public assistance costs for the care of the disabled, while assisting disabled individuals by providing them a measure of income security. Prior to the establishment of the SSD program in 1954, the entire burden of caring for the needy disabled rested exclusively on State, local, and private sources. In enacting the SSD program and the SSI program, which provide uniform federal cash assistance grants for the indigent aged, blind and disabled, 42 U.S.C. §§ 1381, *et seq.*, Congress recognized that many of the potential beneficiaries of the programs were receiving public

³⁵ The cited statistics were derived from SSA reports produced in discovery in the cited lawsuits.

³⁶ *City of New York v. Heckler*, 578 F. Supp. at 1121; *Dixon v. Heckler*, 589 F. Supp. 1512, 1516 (S.D.N.Y. 1984); *Holden v. Heckler*, 584 F. Supp. 463, 481 (N.D. Ohio 1984); *Avery v. Heckler*, 584 F. Supp. 312, 316 (D. Mass. 1984). See also *Doe v. Heckler*, 568 F. Supp. 681, 683 (D. Md. 1983) (Distinguishes SSD from SSI program, recognizing that the latter is a federally-funded disability benefits program replacing state-administered programs).

assistance funded by State and local governments,³⁷ that the cost of providing these benefits was rising³⁸ and, just as significantly, that establishment of the programs would result in substantial savings to the States and local governments.³⁹

Despite this clear congressional purpose, SSA's imposition of the severity standard resulted in human⁴⁰ and financial costs for the States and their disabled citizens. Due to their disabilities, these persons were unable to return to work⁴¹ and many had

³⁷ See S. Rep. No. 2133, 84th Cong., 2d Sess. (1956), reprinted in 1956 U.S. Code Cong. & Admin. News 3880 (noting that many of the older disabled workers had relied on "State and local general assistance programs"); S. Rep. No. 1856, 86th Cong., 2d Sess. (1960), reprinted in 1960 U.S. Code Cong. & Admin. News 3623.

³⁸ House Comm. on Ways and Means, Rep. No. 92-231, 92d Cong., 2d Sess. (1972) [hereafter 1972 House Report], reprinted in 1972 U.S. Code Cong. & Admin. News 4992.

³⁹ When enacted, it was estimated that in its first year, the SSD program would save the States \$28 million. S. Rep. No. 1856, 86th Cong., 2d Sess. (1960), reprinted in 1960 U.S. Code Cong. & Admin. News 3623. When the SSI program was enacted in 1972, it was estimated that the program would save the States \$1.644 billion. 1972 House Report, reprinted in 1972 U.S. Code Cong. & Admin. News 5202. See also the statements on the floor of the House of Representatives by Rep. Wilbur Mills, Chairman of the Committee on Ways and Means recognizing these savings, 117 Cong. Rec. H21092 (June 21, 1971).

⁴⁰ The denial or loss of federal disability benefits resulted often not only in a concurrent loss of dependents' benefits for other family members, see 42 U.S.C. § 402, but also in medical decompensation, reinstitutionalization, family breakups, and homelessness. *City of New York v. Heckler*, 578 F. Supp. at 1118-20.

⁴¹ A 1979 SSA study concluded that only 1 in 10 persons denied disability benefits later engages in substantial gainful activity. See June 30, 1983 House Ways and Means Comm. Hearing at 239 (Statement of John D. Harris, President, National Council of SSA Field Operations Locals, AFGE).

little or no other income;⁴⁰ so the denial or loss of federal disability benefits led many to lose their homes, cars and other possessions. Just as importantly, they were forced to become dependent on relatives, borrow from friends, seek private charity, or apply for State and/or locally-funded public assistance to feed, clothe, and shelter themselves.

This public assistance took the form of cash benefits under the Aid to Families with Dependent Children Program, 42 U.S.C. §§ 601, *et seq.*, and State and locally funded General Assistance programs,⁴¹ and Medicaid benefits,⁴² as well as the provision of public shelters, food banks, medical care in public hospitals, clinics, and nursing homes, and various social and rehabilitative services, mostly funded with State and local revenues. In addition to these direct costs, there were other indirect costs to the States and localities such as increased use of emergency medical services and police services.⁴³

⁴⁰ See, e.g., New York State Division of Operations Bureau of Operations Analysis, *Accelerated Continuing Disability Investigation Cessations: A Characteristics Profile of Affected Persons* (July, 1982) [hereafter *New York State CDI Study*], reprinted in *Social Security Disability Benefits Terminations: New York: Hearing Before the Subcomm. on Retirement Income and Employment of the House Comm. on Aging, 97th Cong., 2d Sess. (July 19, 1982)* [hereafter *July 19, 1982 House Aging Comm. Hearing*] at 177 (The typical claimant terminated from benefits was a single male, age 41, who has no income other than his disability benefits.)

⁴¹ Statewide General Assistance is provided to recipients on a continuing basis in 33 States. Dept. of Health and Human Services Office of Ass't Sect'y for Planning and Evaluation, *Characteristics of General Assistance Programs* (May, 1983). In the remaining States, GA is available in some but not all counties, or on an emergency, one-time only basis. *Id.*

⁴² For example, in Pennsylvania, the cost of providing Medicaid benefits to individuals denied or terminated from federal disability benefits for all reasons was estimated to be \$42,609,567 annually. Mental Health Association of Pennsylvania, *Financial Impact on Pennsylvania and Philadelphia on Terminations and Denials of Benefits to SSI/SSDI Applicants and Recipients*, reprinted in *Social Security Disability Reviews of the Mentally Disabled: Hearings Before the Senate Comm. on Aging, 98th Cong., 1st Sess. 253-54 (Apr. 7 and 8, 1983)*.

⁴³ June 30, 1983 *House Ways and Means Comm. Hearing* at 136 (Statement of Liane Levetan, Commissioner, DeKalb County, Georgia, on Behalf of the National Association of Counties).

The full extent of State-funded assistance necessitated by SSA's improper severity standard is difficult to determine. However, there are estimates that between 30%⁴⁴ and 61%⁴⁵ of the persons terminated from federal disability benefits were eligible for GA and AFDC benefits, with some estimates going higher.⁴⁶ The resulting shift, from the federal government to the States, of the costs of caring for the disabled was in direct contravention of Congress' intent when it established the federal disability programs. The State and local governments will continue to be compelled, improperly, to bear these costs until SSA is required to apply a *de minimis* threshold standard in compliance with the Act.

IV. THE AMBIGUOUS NATURE OF SSA'S NEWEST THRESHOLD SEVERITY POLICY, SSA'S PRACTICE OF REPEATEDLY CHANGING ITS STANDARD DESPITE THE LACK OF ANY CHANGE IN THE STATUTE, AND THE STATES' NEED FOR A CLEAR AND PROPER POLICY WARRANT AFFIRMANCE OF THE COURT OF APPEALS' JUDGMENT.

SSA recently issued two internal rules which, while they might arguably be read to re-adopt the prior slightness standard, reveal the need for revised SSA regulations. SSA Rulings 85-28 and 86-8

⁴⁴ State of Michigan Interagency Task Force on Disability, *The SSI/SSDI Disability Controversy: How and Why the Social Security Administration Has Reduced the Number of SSI/SSDI Beneficiaries* (April, 1983), reprinted in *Social Security Disability Reviews: A Federally Created State Problem: Hearing Before the House Comm. on Aging, 98th Cong., 1st Sess. (June 20, 1983)* at 544.

⁴⁵ New York State CDI Study, reprinted in *July 19, 1982 House Aging Comm. Hearing* at 177.

⁴⁶ In New York, as a result of SSA's application of improper disability adjudication standards, courts have ordered the agency to re-review prior denial and termination decisions in three cases. *Schisler v. Heckler*, 107 F.R.D. 609 (W.D.N.Y. 1984), *aff'd*, 787 F.2d 76 (2d Cir. 1986); *Dixon v. Heckler*, 589 F. Supp. at 1512; *City of New York v. Heckler*, 578 F. Supp. at 1109. Approximately 75% of the disability claimants reinstated as a result of these new reviews previously received State and local public assistance. Gottfried, Assemblyman Richard N., *New York's Disabled Advocacy Program: Human Service and Fiscal Savings* (May, 1986).

withdraw SSA Rulings 82-55 and 82-56,⁴⁸ respectively, and provide that a claim is to be denied as "not severe" without consideration of vocational evidence:

... when medical evidence establishes only a slight abnormality or a combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work even if the individual's age, education, or work experience were specifically considered (i.e., the person's impairment(s) has no more than a minimal effect on his or her physical or mental ability(ies) to perform basic work activities.)

While these Rulings are incorrect in at least one respect and some of the language, read in isolation, appears to return to a "slightness" standard, other provisions of the Rulings suggest that it was not SSA's intent to reintroduce a *de minimis* standard.⁴⁹ For example, SSA Ruling 85-28 provides at page 23:

If the medical evidence establishes only a slight abnormality(ies) which has no more than a minimal effect on a claimant's ability to do basic work activities, but evidence shows that the person cannot perform his or her past relevant work *because of the unique features*

⁴⁸ SSA's apparent effort to change its policy by returning to a slightness standard in SSA Ruling 85-28 was undermined by the agency's failure to withdraw SSA Ruling 82-56, which continued to provide that persons who could not return to their prior work could be denied as having non-severe impairments. SSA Ruling 86-8 attempts to cure this contradiction in policy by withdrawing SSA Ruling 82-56.

⁴⁹ SSA Ruling 85-28 states that SSA's threshold standard has never been more than a *de minimis* test. This is incorrect. See Section II.B. Indeed, the cases cited in the Ruling as supporting this conclusion reached the opposite conclusion. *Stone v. Heckler*, 752 F.2d at 1101; *Estran v. Heckler*, 745 F.2d 340, 341 (5th Cir. 1984). In both of those cases, the courts ruled that SSA's severity regulations exceeded any *de minimis* test as applied to the facts in the respective cases. Rather than invalidate the improper regulations, those courts chose to require SSA to interpret them as embodying a *de minimis* test.

of that work, a denial at the "not severe" step of the sequential process is inappropriate.

To the extent that this exception is limited to "the unique features" of past work, it appears to reflect a continuation of SSA's policy of requiring denials and terminations for other claimants who cannot return to their prior work because of their impairments, without consideration of vocational factors. If this is true, SSA's threshold severity policy continues to transgress the Social Security Act's burden of proof requirements. Claimants would still be denied benefits without being given the opportunity to prove that they are unable to do their past work or to then have the burden of proof shift to SSA to show other gainful activity that they can perform. In addition, while SSA Ruling 85-28 refers to "ability to do basic work activities" as evidence of a "non-severe" impairment, the policy statement does not indicate whether a claimant must be found able to perform only a few, most, or all of the "basic work activities" to be denied benefits on this basis.

Further, SSA has issued internal rules interpreting SSA Ruling 85-28 which, once again, set forth as SSA policy examples of impairments which should be found "non-severe" despite the inability of claimants to return to their former employment.⁵¹ These rules, like SSA Ruling 85-28 itself, demonstrate the facility with which SSA adopts, withdraws, re-adopts and modifies agency policy through internal rules, despite the lack of any change in the relevant statutes. These repeated changes suggest that SSA may continue to "re-interpret" the severity regulations in contradictory ways unless they are modified to specify the slightness standard which is consistent with the Act.

Added to the internal ambiguities in SSA Ruling 85-28 and its subsequent interpretations is the fact that the federal agency has never withdrawn or revised the applicable federal regulations. Those regulations continue to require that claimants be denied and terminated from benefits if their impairments do not "... significantly limit the individual's physical or mental capacity

⁵¹ SSA Program Circular: Disability No. 12-85-OD entitled, "Evaluation of Medical Impairments That Are Not Severe," dated January 14, 1986 (Exhibit N).

to perform basic work-related functions." 20 C.F.R. §§ 404.1520(c); 416.920(c). As discussed above, at least since 1976, this test has been applied as more than the slightness standard referenced in SSA Ruling 85-28.

SSA's reliance on the seemingly conflicting standards in the published regulations and unpublished internal rulings reveals the confused state of SSA's current threshold policy²³ and leaves the State DDSs in an even more untenable position than before. If they apply the published federal regulations as they have always been applied, they would violate the Act's requirement of providing disability assessments with full consideration of vocational factors for all claimants with more than slight impairments. If they do not comply with those federal regulations, they risk receiving more case returns and the imposition of severe financial and administrative sanctions, recently accelerated through new legislation. Added to this confusing situation is the fact that if the State DDSs apply the seemingly less restrictive but still ambiguous test set forth in SSA Ruling 85-28, they also risk sanctions because that standard would appear to conflict with the regulatory one.

For these reasons and because they continue to bear the public assistance costs of caring for the disabled persons improperly denied benefits, the *amici* States endorse respondent's position that the federal regulations must be modified to comply with the Act. The current regulatory prohibition against conducting a full disability assessment unless the claimant's impairment "significantly limits" his or her ability to work must be amended. In its place, the regulations should provide that denials and terminations at step two can occur only in those cases where the claimant's impairment(s) are so slight as to have no more than a minimal impact on the individual's ability to work.

²³ Even SSA has recognized that there has been "misunderstanding" with regard to its severity policy. SSA Memorandum from Patricia M. Owens, Associate Commissioner for Disability, to Disability Determination Services Directors Re: Clarification of "Not Severe Impairment" Policy and Implementation Plans - ACTION, dated October 18, 1985 at 1 (Exhibit O).

CONCLUSION

For the reasons set forth above, the *amici* States urge the Court to affirm the judgment of the Court of Appeals for the Ninth Circuit.

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